Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	MM Docket No. 92-254
Concerning Section 312(a)(7)	)	
of the Communications Act	)	

COMMENTS

Spokane Television, Inc. ("STI"), pursuant to Sections 1.115 and 1.41 of the Commission's Rules, hereby respectfully submits these Comments in the above captioned matter concerning the Application for Review filed by Kaye, Scholer, Fierman Hays & Handler ("Kaye Scholer"), seeking review by the Commission of a letter ruling issued by the Chief, Mass Media Bureau, on August 21, 1992 (FCC Ref. 8210-AJZ/MJM) ("Letter Ruling").

Kaye Scholer sought a ruling from the Mass Media Bureau (the "Bureau") that certain political advertisements featuring dead and bloodied purportedly aborted fetuses were indecent within the meaning of 18 U.S.C. §1464, thereby entitling broadcast licensees to censor or otherwise decline to broadcast those advertisements during hours when there is a reasonable risk that children may be in the audience. The Bureau declined to issue such a ruling, concluding that the political advertisements were not indecent. It also concluded that licensees could run a viewer advisory prior to each spot.

Kaye Scholer now seeks Commission review of the Bureau's decision. A concerned parent, Mark Van Loucks, filed Comments in support of the Application for Review, filed by Kaye Scholer. He

questioned whether a policy that denies licensees' the ability to channel, to those times when children are least likely to be in the audience, programming which presents graphic depictions of dead or aborted and bloodied fetuses or fetal tissues is consistent with the Commission's "adoption and enforcement of children's television programming rules." Comments of Mark Van Loucks in Support of Application for Review at p.14. STI supports Mr. Van Loucks.

Recognizing that "extremely difficult" questions have been raised, the Commission itself invited comment on: (a) what, if any, right or obligation a broadcast licensee has to channel [in the midnight to 6:00 a.m. safe harbor] political advertisements that it reasonably and in good faith believes are indecent or if not indecent, may be otherwise harmful to children; and (b) the proper scope of any such right and the standard by which the Commission should evaluate the reasonableness of broadcasters' judgements rendered in exercising the right. See Public Notice Request for Comments, (FCC 92-486), released October 30, 1992, p.2.

STI is the licensee of KTHI-TV, Fargo, ND.[1] During 1992, STI was forced to air 84 political spots throughout its broadcast schedule similar to the spots the Bureau concluded were not indecent in its Letter Ruling. Following each spot -- and despite the viewer advisory run prior to the airing of the spots as suggested in the Letter Ruling -- KTHI-TV was inundated with calls and letters from the public. The overwhelming majority of KTHI's

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[1] STI is also the licensee of KXLY-TV, Spokane, Washington. In addition, through related companies, the principals of STI own and operate an AM/FM radio combination in Spokane, WA, and television stations in Yakima, Washington; Kennewick, Washington; and Madison, Wisconsin.

viewers were outraged that the station would air such graphic material, and expressed grave concern about the effect of the spots on children in the audience and certain women who may have either recently aborted, experienced a miscarriage or still-birth, or are experiencing an unwanted pregnancy. STI, which takes seriously its responsibilities to the community to air programming consistent with community values and the public interest, could provide little comfort to these viewers by explaining that it was constrained by the Letter Ruling to continue airing the spots or risk violation of Commission Rules governing political advertisements.[2]

The nub of the issue is the tension between the interplay of the "no censorship" provisions of Section 315(a) of the Communications Act, the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, the prohibition against the broadcast of "indecency" under 18 U.S.C. Section 1464 and the Congressionally mandated obligation of broadcast licensees to protect children from harmful exposure to commercial advertisements. See, e.g., Children's Television Programming Order, 6 FCC Rcd 2111 (1991). This matter is made "extremely difficult" where, as the Bureau determined in its Letter Ruling, the political advertisement may not meet the standard for indecency because it does not ". . . describe, in terms patently offensive as measured by contemporary community standards for the broadcast

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[2] KTHI ran the viewer advisory set forth in the Letter Ruling prior to the airing of the spots. KTHI submits, however, that such an advisory is insufficient given that impressionable children are unlikely to change the channel, call their parents or stop watching television. Adults in the audience may also be caught off guard and unable to react in time to change the channel.

medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." [emphasis added] Pacifica Foundation, 56 FCC 2d 94, 98 (1975); Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987), reconsideration denied, 3 FCC Rcd 930 (1987). In its Letter Ruling, the Bureau concluded that the dead and bloodied fetuses did not constitute sexual or excretory activities or organs within the meaning of the definition of indecency.[3]

A candidate's right to air political advertisements is not absolute. FCC Staff has determined that neither Section 312(a)(7) nor Section 315(a) of the Communications Act require the broadcast of political advertisements which the broadcaster reasonably believes contains obscene or indecent material. Letter from Chairman Mark S. Fowler to Hon. Thomas A. Luken, dated January 19, 1984. Thus, licensees may channel programming believed to be indecent to the "safe harbor" where children are least likely to be in the audience. Action for Children's Television v. FCC, 923 F. 2d 1504 (D.C. Cir 1991).

The Commission has held that political advertisements are not entitled to particular placement on a broadcast schedule, leaving this matter largely to the discretion of a licensee. Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1091 (1978). The Commission stated: "...there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast

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[3] Contrary to the conclusion of the Bureau, aborted fetuses or fetal material would appear to fall within the definition of "excrete". See Application for Review, p.13.

day." Id. at 1091. It would appear that the only specific instance in which the Commission has previously approved a licensee's exercise of such discretion was a licensee's refusal to sell time to candidates during newscasts. See, Primer on Political Broadcasting and Cablecasting, 69 FCC 2d 2209, 2289 (1978). The Commission has, however, recognized that a station may reject a candidate's spot for failure to comply with FCC technical standards. Christopher J. Reynolds, 69 FCC 2d 1038 (1978).

Now is the time for the Commission to conform its rules by affording licensees the discretion to channel to the safe harbor political advertisements that are indecent or may be harmful to children. To do otherwise would render a mockery of the Commission's rules and regulations evidencing a desire to limit the exposure of children to harmful commercial matters. Clearly, Congress never intended Section 315 to be used as a device to thwart licensees' obligations to comply with other provisions of the Communications Act, particularly those designed to protect impressionable children.

The broadcasters' decision to channel material it determines to be harmful to children should be tested by its good faith, independent editorial judgment, taking into consideration contemporary community standards, and any other factors it reasonably relies upon in making its decision. In determining whether a particular broadcast matter constitutes obscene or indecent material in violation of 18 U.S.C. 1464, the Mass Media Bureau ruled that "[t]he broadcaster must exercise his/her independent editorial judgement in determining whether the particular material meets this definition or, for example, contains

such value as to deem it non-obscene." See Letter to William T. Carroll, Esq. (Christian Action Network), FCC Ref. No. 8210-AJZ, 9205040 (Mass Media Bureau, June 12, 1992). Similar discretion is needed here to reconcile the "reasonable access" and "no censorship" provisions of the Communications Act consistent with a licensees obligation to the children (and others) in its audience.

The Mass Media Bureau's refusal to allow broadcasters to channel graphic depictions of aborted features is entirely at odds with broadcasters' obligations to protect impressionable children and others from exposure to images and depictions that are likely to be psychologically disturbing and harmful. At the very least, licensees must be allowed to channel such programming to those times of the day children are least likely to be in the audience. Anything less will sacrifice the interests of children contrary to express Congressional intent.

Respectfully submitted,

SPOKANE TELEVISION, INC.

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CERTIFICATE OF SERVICE

I, Patricia Moser, an administrator with the law firm of Rini & Coran, do hereby certify that I caused a copy of the foregoing "**COMMENTS**" to be sent via first-class mail, postage prepaid this 22nd day of January 1993, to the following:

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